FOR ARGUMENT

SUPREME COURT, U. S.
FILED
FEB 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 75-1812.

R. F. SHAFFER, et al.,

Appellants,

v.

ARNOLD HEITNER, as Custodian for MARK ANDREW HEITNER,

Appellee.

On Appeal From the Supreme Court of the State of Delaware.

APPELLANTS' REPLY BRIEF ON THE MERITS.

RICHARDS, LAYTON & FINGER,
4072 DuPont Building,
Wilmington, Delaware. 19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE, BROWN & ENERSEN,
Three Embarcadero Center,
San Francisco, California. 94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
INTRODUCTION	1
ARGUMENT	1
I. THE SEQUESTRATION PROCEDURE HAS TAKEN APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW	1
A. The Seizure of Appellants' Property Was Not Necessary to Serve Any Important Public Interest	3
B. No Showing of a Need for Prompt Action Was Either Made or Required	5
C. There Are No Safeguards	6
II. THE SEQUESTRATION PROCEDURE CANNOT BE USED TO COERCE A GENERAL APPEARANCE	8
III. THE SEQUESTRATION PROCEDURE IS NOT A VALID EXERCISE OF QUASI IN REM JURISDICTION	12
CONCLUSION	13

TABLE OF CITATIONS.

Cases: Page

Fuentes v. Shevin, 407 U. S. 67 (1972) 1, 2, 3, 5, 6, 7, 9
Hanson v. Denckla, 357 U. S. 235 (1958) 9, 11
Hess v. Pawloski, 274 U. S. 352 (1927) 12
Jonnet v. Dollar Sav. Bank of City of New York, 530 F. 2d 1123 (3rd Cir. 1976) 11
Koster v. Lumbermens Mutual Casualty Co., 330 U. S. 518 (1946) 11
Lindsey v. Normet, 405 U. S. 56 (1972) 9
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 2, 5, 6, 7
Ownbey v. Morgan, 256 U. S. 94 (1921) 3, 4
Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 2
U. S. Industries, Inc. v. Gregg, 540 F. 2d 142 (3rd Cir. 1976), petition for cert. filed 45 U. S. L. W. 3178 (Sep. 8, 1976) (No. 76-359) 4, 8

Miscellaneous:

Quasi in Rem Jurisdiction and Due Process Requirements, 82 Yale L. J. 1023, 1031-1032 (1973) 4

INTRODUCTION.

Appellants own stock in a Delaware corporation. Although it lacks jurisdiction over either appellants or their stock certificates, the State of Delaware has sequestered the stock and has deprived appellants of it for two and one-half years. It has done that without any pre-seizure notice and without any hearing or consideration, either before or after the seizure, of the merit of the alleged claims against appellants. Delaware's conceded purpose is to use this leverage to coerce appellants to submit to personal jurisdiction in Delaware. Unless appellants submit to Delaware's potent pressures, their property could be sold to satisfy plaintiff's *ex parte* claim.

The Delaware sequestration procedure is plainly inconsistent with the Constitution. Appellee attempts to exempt it from established due process requirements because the taking of appellants' property is aimed, not at the property itself, but at coercing appellants to forfeit their constitutional rights and submit to personal jurisdiction in Delaware. The logic of this argument is not merely unsound, it is perverse.

ARGUMENT.

I. THE SEQUESTRATION PROCEDURE HAS TAKEN APPELLANTS' PROPERTY WITHOUT DUE PROCESS OF LAW.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' . . . It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U. S. 67, 80 (1972) (citations omitted).

Appellee concedes that these "fundamental principles", enunciated in this Court's decisions in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601 (1975), *Fuentes v. Shevin*, 407 U. S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), are applicable here (A. B., p. 3).[1] Appellee also concedes that Delaware has taken appellants' property without prior notice, without any evaluation of the merit of the alleged claims and without opportunity for hearing, either before *or after* the seizure (A. B., pp. 2, 9-10; see O. B., p. 7).

Appellee contends that the taking of appellants' property without prior notice or hearing did not violate those fundamental constitutional principles, arguing that the situation is "extraordinary" and that there are sufficient other safeguards to satisfy due process (A. B., p. 3). Appellants agree that there are extraordinary situations that "justify *postponing* notice and opportunity for a hearing . . . . These situations, however, must be truly unusual."[2] *Fuentes v. Shevin*, 407 U. S. 67, 90 (1972). See also *Bodie v. Connecticut*, 401 U. S. 371 (1971). All parties agree that such situations must meet the following test:

> "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes v. Shevin*, 407 U. S. at 91. See A. B., p. 3.

1. Appellee's Answering Brief will be cited herein as "A. B." Appellants' Opening Brief on the Merits will be cited as "O. B."

2. All emphasis herein is added unless otherwise stated.

As explained below, the Delaware statute does not satisfy any of these criteria (pp. 3-8 below). Even if it did, the statute is still unconstitutional because, as appellee concedes, Delaware's procedure does not "*postpon[e]* notice and opportunity for hearing." It *denies* it altogether (O. B., pp. 17-18; A. B., p. 10). The denial of even a postponed hearing on the merits of the alleged claim or the justification for resort to such harsh procedures deprives the statute of any possible claim to constitutionality.

A. The Seizure of Appellants' Property Was Not Necessary to Serve Any Important Public Interest.

The seizure of appellant's property plainly was not "directly necessary to secure an important governmental or general public interest" of the kind referred to in *Fuentes*, 407 U. S. 91-92. See O. B., pp. 8-13. Obtaining jurisdiction in a dispute between private parties does not remotely approach such urgent governmental interests as collecting taxes, meeting the needs of a national war effort, protecting against the economic disaster of a bank failure or protecting the public from misbranded drugs and contaminated food. The Court expressly distinguished these situations from cases, such as this, where "no more than private gain is directly at stake." See 407 U. S. at 91-93.[3]

But whatever the importance of the State's interest in securing jurisdiction, since the development of long-arm jurisdiction, it clearly is no longer "necessary" to seize property in order to serve that interest (See O. B., pp. 13-14). Thus, this Court's citations of *Ownbey v. Morgan*, 256 U. S. 94 (1921) as an historical example of a permis-

3. Appellee's suggestion that this is not such a case because it purports to be brought on behalf of the corporation and of other stockholders similarly situated (A. B., p. 5) must be dismissed as disingenuous. This is still merely a commercial suit designed to "recover" money.

sible pre-hearing seizure must surely have reference to *Ownbey's* context, which antedated the announcement of modern constitutional principles of personal jurisdiction and procedural due process. Those citations most certainly do not mean that attachment of property is still "necessary" to secure jurisdiction or that attachments designed to secure jurisdiction are free of due process limitations. See, *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142, 151-153 (3rd Cir. 1976); Note, *Quasi in Rem Jurisdiction and Due Process Requirements,* 82 Yale L. J. 1023, 1031-1032 (1973).

Appellee claims that even if the routine acquisition of jurisdiction over non-residents does not constitute an extraordinary situation, it does become extraordinary if the case happens to be a derivative suit involving issues of Delaware corporate law (A. B., p. 5). Appellee offers no explanation of why that should be so and no reason appears. It could fairly be said that every case potentially involves the interpretation or implementation of some state law, and corporate law has no claim to unique importance.

Appellee's alternative suggestion that sequestration enables Delaware to call corporate fiduciaries to account and to grant complete relief (A. B., pp. 5-6) is also wrong. Delaware does not require officers or directors of Delaware corporations to own stock or other property in Delaware, and sequestration is not effective to reach anyone who does not own such property or who owns stock held in a street name. In this case several of the defendants named in the complaint have been unaffected by the sequestration order; they are not before the court in any way (Compare, A., p. 4 with A., p. 37). Thus, sequestration, far from bringing all the parties before the Court so complete relief can be granted, discriminates among defendants on an

irrational basis. It forces the entire burden and risk of litigation upon those corporate fiduciaries who have a financial interest in their company.[4]

B. No Showing of a Need for Prompt Action Was Either Made or Required.

With respect to the second *Fuentes* criterion for determining extraordinary situations, appellee says only that "the need for prompt action is inherent in the nature of the remedy itself. If notice were given prior to the seizure, the appellants could transfer the property and defeat jurisdiction" (A. B., p. 5).

If that kind of unsubstantiated fear were sufficient, any attachment would be justified.[5] Surely this Court had in mind a less hypothetical need for prompt action. Indeed, in *North Georgia Finishing* the statute required, and plaintiff filed, an affidavit stating that there was reason to apprehend the loss of the claim unless the garnishment was issued. 419 U. S. at 602-604. Nevertheless, the Court found a conclusory affidavit to be insufficient. See 419 U. S. 607. See also, 419 U. S. at 612 (Powell, J., concurring). Here, appellee made no showing at all of a need for prompt action and the Delaware sequestration statute

4. If Delaware truly had such a strong interest in calling officers and directors of Delaware corporations to account in Delaware it could easily implement it by enacting a statute requiring actual consent to jurisdiction as a condition to holding positions with Delaware corporations. As appellee notes, some other states have enacted consent statutes, but far from supporting his position, that only casts doubt on the strength of Delaware's interest and the validity of its procedures (A. B., pp. 13-14; see also pp. 13-14 below).

5. Appellee in effect is arguing that since there is no constitutional procedure or basis for obtaining jurisdiction he is entitled to act quickly and without prior notice to make the unconstitutional procedure effective. That stands the due process clause on its head.

is not "narrowly drawn to meet any such unusual condition." *Fuentes v. Shevin,* 407 U. S. at 93.

C. There Are No Safeguards.

Appellants' opening brief demonstrated in detail that, even if this case presented an extraordinary situation, the Delaware sequestration procedure affords no meaningful safeguards that would satisfy the requirements of due process (O. B., pp. 14-19). Appellee has not dealt with that demonstration at all, but only attempts to excuse the lack of the most obviously required safeguards. His failure to meet the issue is hardly surprising for it is clear that the Delaware statute is *not* narrowly drawn and it does not permit, let alone require, anyone to determine that the seizure was "necessary and justified in the particular instance." *Fuentes v. Shevin,* 407 U. S. at 91.

Appellee seeks to distinguish the Delaware seizure statute from those struck down in *North Georgia Finishing* and *Fuentes* because the sequestration order is issued by a judge upon a verified complaint and affidavit (A. B., p. 7).[6] But the use of a judge rather than a clerk provides no meaningful control over the seizure process. Appellee's own brief makes the point eloquently: Sequestration "is not dependent upon the merits of the complaint . . ." (A. B., p. 10). "[T]he sole relevant facts are appellants' non-residence and ownership of property in Delaware. Pre-seizure procedures to confirm any such facts are meaningless." (A. B., p. 9). They certainly are. The *ex parte* pre-seizure proceeding is a rote drill, a purely ministerial,

6. Appellee's suggestion that the complaint must be verified (A. B., pp. 2, 7) is simply erroneous. The statute contains no such requirement and there is no other provision which would ensure that the plaintiff set forth the merits of his claim under oath. Cf., *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. 601, 607 (1975).

non-discretionary act, and neither of the only two relevant facts has anything to do with whether plaintiff has a valid claim or with fairness to the defendant whose property is seized (See O. B., pp. 14-16). Under those conditions, what safeguard is it that the title of the person signing the seizure order is "judge" rather than "clerk"?

Appellee offers no other suggestion as to how the Delaware statute safeguards defendants against a harsh, unfair or unmeritorious seizure of property.[7] He only tries to excuse the lack of a post-seizure hearing because the purpose of the seizure is to obtain jurisdiction (A. B., pp. 9-10). But appellee never does explain how this difference in his motives can be constitutionally determinative of appellants' due process rights. To appellants the deprivation is the same: Delaware has had a stranglehold on their property for more than two and one-half years (see A., pp. 19-24), and during that entire period there has been no opportunity for hearing or examination by anyone of the validity or even the probable validity of the underlying claims. *Fuentes v. Shevin,* 407 U. S. at 97; *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. at 607. And Delaware permits appellants but a single way to obtain the release of their property—by surrendering their due process rights and submitting themselves and all their other property to the jurisdiction of Delaware's courts. Such a condition cannot possibly be squared with the Constitution. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U. S. at 607, 613.

Appellee's remaining argument is a patent strawman: He says that due process does not impose any "inflexible requirements." (A. B., p. 8). Of course that is correct, and

7. Appellee refers to the filing of a bond (A. B., p. 2). It is true that a bond was posted in the amount of $1,000. But that hardly provides a safeguard against the loss that appellants might suffer from the seizure of their property having a total value exceeding one million dollars (A., pp. 59-66).

appellants have never advocated that the Delaware sequestration statute comply with any "inflexible requirements." But appellants do insist that it comply with the minimum standards of fairness under the Constitution, which it clearly does not.

II. THE SEQUESTRATION PROCEDURE CANNOT BE USED TO COERCE A GENERAL APPEARANCE.

The parties agree that the principal purpose of sequestration is to force appellants to enter a general appearance and submit to unlimited *in personam* jurisdiction. Appellee claims that is his only purpose (O. B., p. 20; A. B., pp. 1, 9-10).

Appellants contend that all assertions of *in personam* jurisdiction, under any guise or label, are subject to the same due process requirements. The Court of Appeals for the Third Circuit agrees. In *U. S. Industries, Inc. v. Gregg,* 540 F. 2d 142 (3rd Cir. 1976), *petition for cert. filed* 45 U. S. L. W. 3178 (Sep. 8, 1976) (No. 76-359), it specifically rejected the decision and reasoning of the Delaware Supreme Court in this case, and held that the Delaware sequestration statute cannot be applied in the absence of the minimum contacts required by the Constitution. See 540 F. 2d 154-156; O. B., pp. 20-25.

Nowhere in his brief does appellee even acknowledge the existence of *U. S. Industries, Inc. v. Gregg, supra.* And he has no answer to this argument except to say the court below disagreed with it and found the *quasi in rem* label dispositive (A. B., p. 12). Of course it did; that is one reason why this appeal was taken. One can only conclude from appellee's brief that he now concedes the applicability of the minimum contacts requirements. Indeed, the bulk of his argument is an unsuccessful attempt to show that the requirements are satisfied (A. B., pp. 12-16).

Appellee's attempt to show that appellants have the requisite minimum contacts is both irrelevant and without merit. It is irrelevant for the reason that the Delaware Supreme Court has said so as a matter of Delaware law. That Court considered the question and squarely held that jurisdiction under the Delaware sequestration statute is not subject to *in personam* analysis, but rather is "*quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum" (A., p. 102. See O. B., p. 21; A. B., p. 12). Thus, under the Delaware statute appellant's contacts are irrelevant, and they are not even afforded an opportunity to show that they lack sufficient contacts with Delaware. Therefore, to accept appellee's argument this Court would be required to reject the clear holding of the Delaware Supreme Court as to the meaning of a state statute and, in effect, to write a new statute for the Delaware legislature. Accordingly. appellee's suggestion that the Court should uphold the application of the statute to coerce appellants to submit to *in personam* jurisdiction on the theory that they in fact have sufficient contacts with Delaware is plainly wrong.[8]

Moreover, appellee is wrong in his claim that appellants have sufficient contacts with Delaware to satisfy the Constitution. The constitutional standards are not subject to serious dispute; they were well expressed in *Hanson v. Denckla,* 357 U. S. 235 (1958), the Supreme Court case

8. A conclusion that appellants do have sufficient contacts with Delaware would not save the sequestration statute because it would not cure any of the defects described in Section I, above, or the statute's failure to permit appellants any opportunity to contest the matter:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin,* 407 U. S. at 87 (footnote omitted). See also *Lindsey v. Normet,* 405 U. S. 56, 66 (1972). ("Due process requires that there be an opportunity to present every available defense.")

most like this one. In *Hanson* this Court held that Florida could not constitutionally assert *in personam* jurisdiction over a non-resident trustee even though the settlor of the trust was domiciled in Florida, the trustee had remitted income to her there and matters of trust administration were conducted there. This Court emphasized that personal jurisdiction depends upon the acts of *defendant,* not upon those who claim some relationship with him, not upon choice of law factors and not upon convenience or the "center of gravity" of the controversy:

> "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U. S. at 253.
>
> . . .
>
> "It is urged that because the settlor and most of the appointees and beneficiaries were domiciled in Florida the courts of that State should be able to exercise personal jurisdiction over the nonresident trustees. This is a non sequitur. . . . *It [Florida] does not acquire that jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the trustee.* As we have indicated, they are insufficient to sustain the jurisdiction." 357 U. S. at 253 (footnotes omitted). See also 357 U. S. at 252.

In view of *Hanson,* appellee's reliance upon the asserted interest of Delaware in adjudicating questions concerning Delaware corporations clearly is misplaced. Delaware may have such an interest, but it cannot override the lack of any purposeful contacts by appellants.

Furthermore, appellee's characterization of Delaware's interest as "vital" (A. B., p. 13) is more than a slight exaggeration. As this Court has accurately observed:

> "Under modern conditions corporations often obtain their charters from states where they no more than maintain an agent to comply with local requirements, while every other activity is conducted far from the chartering state. Place of corporate domicile in such circumstances might be entitled to little consideration under the doctrine of forum non conveniens, which resists formalization and looks to the realities that make for doing justice." *Koster v. Lumbermens Mutual Casualty Co.,* 330 U. S. 518, 527-528 (1946). See also *Jonnet v. Dollar Sav. Bank of City of New York,* 530 F. 2d 1123, 1139 (3rd Cir. 1976) (concurring opinion).

This observation is particularly applicable to Delaware, the state most commonly used for formal incorporation (see A. B., p. 6, n. 8), and it carries even greater force where, as here, constitutional rights are at stake.[9]

Appellee cannot point to a single act by any appellant in Delaware. Appellee also cannot point to a single case holding that being an officer or director of a corporation without anything more is sufficient to subject one to per-

---

9. If Delaware considered its interest in officers and directors to be as strong as appellee claims, it could enact a proper consent statute (See A. B., pp. 13-14; p. 5, n. 4 above).

sonal jurisdiction in the state in which the corporation happens to be chartered.[10]

Officers and directors of Delaware corporations are not required to own shares in the company or to conduct any meetings in Delaware or even to visit Delaware for any purpose. Their positions alone simply do not justify compelling them to take on the burdens of litigation there.[11]

III. THE SEQUESTRATION PROCEDURE IS NOT A VALID EXERCISE OF QUASI IN REM JURISDICTION.

Appellants demonstrated that, even if the concededly *in personam* jurisdiction purpose of the seizure in this case could be ignored, the statute cannot be sustained as an attempt to assert *quasi in rem* jurisdiction because: (1) there is no property in Delaware on which to base such jurisdiction (O. B., pp. 25-26); and (2) Delaware affords appellants no opportunity to appear and defend their property unless they submit to unlimited personal jurisdiction (O. B., pp. 23-24). Having admitted that sequestration in Delaware is really a device for acquiring *in personam* jurisdiction, appellee completely ignores those points, and they remain unanswered. They render the Delaware sequestration statute even more offensive to due process.

---

10. Several appellants lack even that tenuous nexus with Delaware, a fact appellee occasionally recognizes (Compare, A. B., p. 11, n. 5 with A. B., pp. 14-15).

11. This case does not remotely resemble *Hess v. Pawloski*, 274 U. S. 352 (1927), on which appellee relies (A. B., p. 15). There, of course, the defendant had done a purposeful act in the State and the action arose out of that very act. Here no appellant has done anything in Delaware and the conduct involved in the alleged claim occurred thousands of miles from Delaware.

CONCLUSION.

For the reasons stated, the decision of the Delaware Supreme Court should be reversed and the case remanded with direction to dismiss for lack of jurisdiction.

Respectfully submitted,

RICHARDS, LAYTON
& FINGER,
4072 DuPont Building,
Wilmington, Delaware.
19801

EDMUND N. CARPENTER, II,
R. FRANKLIN BALOTTI,

McCUTCHEN, DOYLE,
BROWN & ENERSEN,
Three Embarcadero Center,
San Francisco, California.
94111

JOHN R. REESE,
LYNN H. PASAHOW,

Attorneys for Appellants.

February 14, 1977.